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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC. and
NATIONAL BROADCASTING COMPANY, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF RESPONDENTS NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION AND PUBLIC BROADCASTING SERVICE

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Opinions Below

The opinion of the Court of Appeals (Pet. App. 1a-27a)* is reported at 551 F.2d 1252 (D.C. Cir. 1976). The Memorandum and Opinion and Order of the District Court from which an appeal was taken by the Respondents herein

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* "App." refers to the Appendix filed with Petitioner's Brief. "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari filed in this case. "JA" refers to the Joint Appendix filed with the Court of Appeals.

(Pet. App. 29a-35a) is reported at 397 F. Supp. 186 (D.D.C. 1975). Earlier opinions written by Judge Gesell with respect to the same application by the Respondents (Pet. App. 36a-45a) are reported at 386 F. Supp. 639 (D.D.C. 1975).

Jurisdiction

The decision of the Court of Appeals was entered on October 26, 1976. (Pet. App. 1a-27a) A petition for rehearing and a suggestion for rehearing *en banc* were denied on December 3, 1976. (Pet. App. 28a) The petition for certiorari was filed on January 7, 1977 and was granted on March 28, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Did the United States Court of Appeals for the District of Columbia correctly hold that, pursuant to the long-established common law right of all citizens to inspect and copy public records, members of the broadcast press should be permitted to copy the White House tapes played in open court and introduced in evidence in *United States* v. *Mitchell, et al.*, for the purpose of broadcasting them to the public?

Statement of the Case

The trial of former Attorney General John Mitchell, former White House aides H. R. Haldeman, John Ehrlichman and Robert Mardian and Attorney Kenneth W. Parkinson commenced before Judge Sirica in the United States District Court for the District of Columbia on October 1, 1974. Central to the trial were the so-called White House

tapes introduced in evidence by the prosecution. The trial lasted over 13 weeks, and it is estimated that approximately 1300 members of the public attended some or all of the trial. (App. 21) Each person attending the trial was furnished with earphones which permitted him to listen to the White House tape recordings as they were introduced in evidence and played to the jury. Transcripts of the tape recordings were published in newspapers, magazines and books. And, as the petition for certiorari in this action correctly observed, the transcripts "continue to be available at bookstores around the country." (Pet. 14)

On November 12, 1974, a group of broadcasters consisting of National Broadcasting Company, Inc., American Broadcasting Companies, Inc. and CBS Inc., together with the Radio Television News Directors Association, filed a petition seeking the opportunity to copy the tapes introduced in evidence so as to broadcast them to the public. (App. 12-14) On November 13, 1974, Public Broadcasting Service joined the application. (App. 18-19)

On November 13, 1974, the application of the broadcasters (which had been made before Judge Sirica) was assigned by Chief Judge Hart to Judge Gesell (App. 17-18), who directed the Clerk of the Court to prepare a statement in affidavit form detailing the mechanical procedures followed during the *Mitchell* trial in reproducing, playing to the jury and receiving in evidence the tapes and indicating any facts bearing upon the availability for reproduction by the Clerk of those portions heard by the jury and the expense and time factors involved. All parties served with the broadcasters' application, including all the defendants, the Special Prosecutor's Office and former President Nixon, who desired to support or oppose the application were ordered to file written positions with respect thereto by November 26, 1974. (App. 22)

On November 26, 1974, the United States filed a statement concluding that the "Special Prosecutor, as attorney for the United States, does not foresee that the rights of the defendants or of the United States to a fair trial would be jeopardized if the motion is granted, and accordingly, does not oppose the motion." (App. 28-29) In its memorandum, the United States also observed that if the motion were granted, procedures would be required to insure that the duplication process did not interfere with the orderly presentation of evidence or threaten the integrity of the recordings introduced in evidence. Since "more than one copy of the recordings already exists", the Special Prosecutor's Office concluded, "this should be no problem." (App. 29, n.3)

The affidavit filed on November 26, 1974 by James F. Davey, Clerk of the United States District Court for the District of Columbia, confirmed that the reproducing of tapes introduced in evidence could be accomplished without either interfering with the presentation of evidence or threatening the integrity of the original court exhibits. (App. 23-27)

No opposition was filed by any of the defendants in the *Mitchell* trial with respect to the broadcasters' application.* The only opposition to the broadcasters' application

* Of the five defendants, only one—H. R. Haldeman—filed any document with either the district court or the Court of Appeals. That was a one-sentence statement filed by Mr. Haldeman in the Court of Appeals opposing the broadcasters' application on the ground that it could prejudice his rights, if he should be granted a new trial. (App. 99) Mr. Haldeman's filed document did not state when this conclusion was reached and why it was not expressed to Judge Gesell; how it was believed any prejudice would or could result; and what legal basis, if any, there was in support of his opposition.

The Court of Appeals correctly held with respect to the one-sentence opposition filed with it that "[t]his pro forma statement hardly warrants careful attention." (Pet. App. 20a, n.47) Mr. Haldeman does not seek review by this Court of the decision of the Court of Appeals and, in light of the fact that this Court has recently denied certiorari to Mr. Haldeman's appeal from his conviction, 45 U.S.L.W. 3764 (U.S. May 23, 1977), the point may now be moot.

was filed by former President Nixon (App. 30-39), who contended, *inter alia*, that "broadcast of the tapes by the applicants" would "further intrud[e] on the need for confidentiality in presidential discussions and would violate the privacy of and embarrass individuals, including Mr. Nixon, whose voices were contained on the White House tapes. (App. 31)

Judge Gesell's Ruling

On December 5, 1974, Judge Gesell entered an opinion and order (Pet. App. 36a-43a) concluding that "[t]he tape exhibits are in evidence and have therefore come into the public domain and the public should have an opportunity to hear them." (Pet. App. 41a) Judge Gesell concluded that:

> "As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records. *Ex parte Drawbaugh*, 2 App. D.C. 404, 407 (1894). *See also, United States* v. *Burka*, 289 A.2d 376 (1972); *Belt* v. *Pr. George's County Abstract Co.*, 73 Md. 289,

20 A. 982 (1890)." (Pet. App. 38a; emphasis in original)

Judge Gesell further held that the general right of the public to have access to and copy exhibits was especially reinforced in this particular case by the directives of the Judicial Conference of the United States issued under authority of 28 U.S.C. § 457 (1970). Observing that there was "congressional, judicial and executive recognition of the need to make available and preserve materials from a trial like the present, including the evidentiary tapes, bearing as they do directly on executive conduct at the highest levels", Judge Gesell concluded that "the public should have the opportunity to hear [the tapes]." (Pet. App. 40a-41a)

Judge Gesell then dealt with and rejected the arguments against broadcasting the tapes made by former President Nixon. Noting that the Court had "carefully reviewed transcripts of the tapes in issue" and that it was apparent that Judge Sirica had "assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial", Judge Gesell concluded that:

"Only portions of the tapes strictly germane to the criminal proceeding have been played to the jury. Moreover, the portions of the tapes here in issue are now of public record. Although former President Nixon has been pardoned, he has standing to protest release by the Court but he has no right to prevent normal access to these public documents which have already been released in full text after affording the greatest protection to presidential confidentiality 'consistent with the fair administration of justice.' *United States* v. *Nixon, supra,* 94 S.Ct. at 3111. His words

cannot be retrieved; they are public property and his opposition is accordingly rejected." (Pet. App. 41a)

The opinion concluded with a request for suggestions from the parties by January 2, 1975 as to how the tapes should be made available to the public.

The Motion for Certification

On December 18, 1974, former President Nixon moved Judge Gesell to certify his decision and order pursuant to 28 U.S.C. § 1292(b) (1970). (JA 63-72) The motion urged that Judge Gesell's December 5 order had resolved in the broadcasters' favor all relevant issues in the case with respect to the right of the broadcasters to copy and broadcast the tapes introduced in evidence, leaving only "for later decision whether a procedure can be created whereby copies can be made available without undue burden to the Clerk and without 'over commercialization' in the initial distribution process." (JA 64)

Judge Gesell's Rejection of the Initial Plan Submitted

On December 27, 1974, the broadcasters and Warner Communications, Inc.* ("Warner") filed a memorandum and proposed order before Judge Gesell setting forth their detailed suggestions as to how the tapes could be reproduced and distributed to the public in a manner consistent with Judge Gesell's order of December 5, 1974. (App. 47-

* Warner filed a separate application for leave to copy the tapes on December 2, 1975, three weeks after the filing of that of the broadcasters and while the broadcasters' application was pending before Judge Gesell. (App. 39-40) The broadcasters' appeal from Judge Sirica's ruling to the Court of Appeals was docketed as No. 75-1409; Warner's was docketed as No. 75-1410. (App. 1) For reasons which have not been stated, Mr. Nixon reversed the order of the parties in the caption chosen for submission of this case to this Court on petition for certiorari.

55) By order dated January 8, 1975, Judge Gesell declined to accept the detailed suggestions of the broadcasters and Warner with respect to the copying and distribution of the tapes. (Pet. App. 44a-45a) Judge Gesell thereupon denied the pending applications without prejudice and referred the matter back to Judge Sirica for any further action. (*Id.*)

Judge Sirica's Ruling

After the conclusion of the *Mitchell* trial, Judge Sirica held a hearing on March 6, 1975 at the request of the applicants with respect to the status of the application. At the hearing, Judge Sirica requested briefing as to whether the *Mitchell* trial should be deemed over for purposes of his consideration with respect to permitting the copying of the tapes. After submission of briefs limited to this issue, Judge Sirica entered an order denying immediate access to the tapes. (Pet. App. 29a-35a) The primary basis for the decision was Judge Sirica's conclusion that public dissemination of the tapes might be prejudicial to the convicted defendants in the *Mitchell* case should a retrial be ordered. (Pet. App. 30a-31a)

The Decision of the Court of Appeals

The decision of the Court of Appeals reversed Judge Sirica's decision—and did so on narrow and explicitly non-constitutional grounds. Holding that at common law "a right to inspect and copy public records" has long existed (Pet. App. 8a)—a right not denied by Mr. Nixon (Pet. App. 12a)—the Court held that the common law right extended as well to court exhibits. Acknowledging that the right of access to judicial records was not absolute, the Court concluded that Judge Sirica had erred by permitting the "diminished interests in confidentiality" of

already publicly-heard tapes "to interfere with the public's right to inspect and copy the tapes." (Pet. App. 17a)

The Court dealt first with Judge Sirica's conclusion that absent a "compelling reason" to make the tapes public he would not do so because of the possibility of interfering with the rights of the defendants in any new trial which they might be afforded by virtue of appellate review of their convictions. Concluding that the district court had "misconceived the nature of its discretion" by placing the burden in the case on the broadcasters rather than on Mr. Nixon, the Court of Appeals held the risk of interfering with the rights of the defendants at a "hypothetical second trial" far too indefinite, insufficiently grave (in that the tapes had all been held to be admissible evidence), and all but totally unsupported by the very defendants the order was designed to protect.* (Pet. App. 17a-20a)

The Court of Appeals further held that Judge Gesell had not abused his discretion in determining that the tapes could be inspected and copied. The "privacy" considerations relied upon by Mr. Nixon were rejected, as were Mr. Nixon's arguments that some kind of residual deference should be paid to presidential conversations after they had been played in open court and after their widespread publication. (Pet. App. 22a-25a)

The Court of Appeals further ordered that, on remand, a plan be devised which would assure prompt distribution of the tapes "on an equal basis to all persons desiring copies." (Pet. App. 25a) On motion of Mr. Nixon, the Court of Appeals stayed its mandate pending the filing of a petition for certiorari. However, it remanded the record to Judge Sirica in the interim for the limited purpose of

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* As noted previously, only defendant Haldeman filed any opposition to the broadcasters' application and that was a pro forma opposition. (Pet. App. 20a, n.47)

permitting the adoption of a plan of distribution of the tapes to the public.*

Introduction and Summary of Argument

Introduction: The Tapes

We start with a proposition that has never been at issue but which is at the heart of the case: hearing the White House tapes introduced in evidence in the *Mitchell* trial adds considerably to one's ability to comprehend what was meant by each of the participants in the cataclysmic national events which have come to be known under the heading of Watergate. As Fred Graham of CBS News observed in his affidavit submitted during the trial:

> "[I]n perhaps the most important trial in this country's history from the standpoint of informing the public, I have found the broadcast media handicapped because of the crucial role of the tapes. As I listen to the tapes in the courtroom, I find that I understand Watergate in a way that I had never understood it before, even though I have reported almost exclusively on Watergate for the past eighteen months. The only way to try to convey this to the public in a broadcast is to attempt to copy the speakers' inflections as I quote them on the air—but this is so difficult and I am so unsure that I can do fairness to them all, that I have virtually abandoned it." (App. 21)

* On January 11, 1977, the broadcasters and Warner submitted a plan to Judge Sirica pursuant to which the National Archives and Recording Service (the "National Archives") would produce and distribute the tapes to the public. The National Archives had previously agreed to accept the responsibilities involved in the plan submitted. A copy of the plan submitted is annexed as Appendix 3 to the opposition filed by Warner to the granting of certiorari.

Numerous affidavits submitted to the District Court demonstrated that only by hearing the tapes could one understand the import of what was being said. Carol Falk of *The Wall Street Journal* thus observed that:

> "In a telephone conversation between Charles Colson and Hunt, Colson repeatedly asks Hunt to say no more about Watergate, and Hunt repeatedly tries to involve Colson by giving him pieces of information. Colson's expressive voice and the pace of his pleas to Hunt impressed me with the fact that he was trying desperately to end the conversation without alienating Hunt, and that Hunt was making it difficult for him to do so. The tape captures the interplay between these two personalities far better than the transcript can." (App. 78)

Another example was provided by Hays Gorey of *Time Magazine* who recalled that:

> "Phrases like 'uh-huh,' and 'um-hum,' appear throughout the recordings and the transcripts. In the transcripts, they are all the same, or nearly the same. In the recordings, those expressions are vastly different: an 'um-hum' in one context, and said with one tone of voice, can mean mere acknowledgment of an idea or a proposal; in another context and said in another tone of voice, it expresses surprise, or determination, or acceptance or rejection. I recall that on one occasion during the trial there was a serious clash between John Ehrlichman and James Neal over whether a particular 'uh-huh' uttered by Ehrlichman during one of the taped conversations signified acceptance or rejection of the idea being discussed. A reader of the transcripts simply could not tell; but a person who listened to the tape could easily decide

that on that occasion Mr. Ehrlichman's 'uh-huh' unmistakably signified acceptance." (App. 83-84)

Even when otherwise clear words are used in the tapes, the import of a statement varies greatly depending on whether it was meant as a declaration, a query, a suggestion or mere wishful thought. Finlay Lewis of *The Minneapolis Tribune* thus observed that:

> "On the tape of a March 21, 1973 conversation, Mr. Nixon and John Dean discuss the payment of hush money to E. Howard Hunt, Jr. At one point, Mr. Nixon says to Dean: 'For Christ's sake, get it.' The interpretation of that statement was the subject of considerable debate within the House Judiciary Committee, which was relying on the transcript of the conversation rather than on the tape recording. But when one hears Mr. Nixon making that statement on the tape, it becomes clear that he is giving Dean a direct order to get hush money for payment to Hunt. The tape removes the ambiguities of the transcript." (App. 91-92)

Perhaps the best illustration of the public advantage served by hearing the tapes, as opposed to merely reading transcripts of them, was offered by Mr. Nixon in his recent televised interviews with David Frost. As the Court will doubtless recall, significant portions of the interview dealt in their entirety with what Mr. Nixon *meant* when he uttered certain words which are contained on the tapes. One extended example may suffice:

(Frost) "Here's Dean, talking about this hush-money for Hunt; talking about blackmail and all of that; I would say that you endorsed to ratify it. But, let's leave that on one side. . . .

(Nixon) "I didn't endorse or ratify it.

(Frost) ". . . why didn't you stop it?

(Nixon) "Because at that point, I had nothing to . . . no knowledge of the fact that it was going to be paid. I'd had no knowledge of that fact that, ah, the . . .

"what you have mentioned in the transcript of the next day, where Mitchell said he 'thought it'd been taken care of.' I think that was what the words were or words to that effect. I wasn't there. I didn't . . .

"I don't remember what he said. That was only reported to me. The point that I make is this: It's possible . . . it's a mistake that I didn't stop it. The point that I make is: That I did consider it. I've told you that I considered it. Ah, I considered it for reasons that I thought were very good ones. Ah, I would not consider it, ah, for, ah, the other reasons, which would have been in my view, bad ones.

(Frost) "But that night though, the night of the 21st. I mean, in the conversation with Colson after you'd been exchanging dialogue about getting off the reservation, and so on, ah, Colson said to you something about the fact that, 'It's the stuff after the cover-up. I don't care about the people involved in the cover-up; it's the stuff after that's dangerous, Dean and other things, and the things that have been done.' And, you said, as I'm sure you know ah, 'You mean with regard to the defendants. Of course, that was . . . that had to be done. Brackets (laughs)', whatever that means. But, I mean, so that night

you were saying that had to be done. You were realizing that doing something for the defendants was a necessity.

(NIXON) "No, I don't interpret that, that way at all. Ah, I, ah, I . . .

(FROST) "How do you recall it?

(NIXON) "I can't recall that . . . I can't recall that conversation, ah, and I can't vouch for the, the accuracy of the transcription on that. Ah, but I do say . . .

(FROST) "That's absolutely . . . it's an exhibit of the Watergate trial.

(NIXON) ". . . ah, that . . . the statements . . . the tapes that have been made public, on the 22nd, with regard to my . . . and the one on the 21st as well, ah, with regard to the whole payments problem, ah, I think are very clear with regard to my attitude.

(FROST) "But, on the short term point, that was, ah, an exhibit, and, ah, part of the, ah, basic file at the trial was that conversation, Colson saying, 'It's the stuff after that's dangerous.' And, you saying, 'You mean with regard to the defendants. Of course that was . . . that had to be done. Brackets (Laughs).' I mean, that's absolutely on the record, and, ah, authenticated and played publicly.

(NIXON) "Well, I can't interpret it at this time."•

• The above quotation is from pages 35 through 38 of the transcript of the Frost-Nixon interview broadcast nationally on May 4, 1977.

Hearing the tapes, we believe, will enable the public to make precisely the type of "interpretation" that Mr. Nixon could not make.

Summary of Argument

All the materials at issue in this case are public. All were played in open court and heard by those present in court. All have been published. The Court of Appeals held that, pursuant to the common law right of all citizens to inspect and copy public records, television and radio broadcasters should be permitted to copy the White House tapes played in open court and introduced in evidence in the *Mitchell* trial for the purpose of broadcasting such tapes to the public. We believe that the Court of Appeals' decision was, in all respects, correct.

In I art I of this brief, we urge that the Court of Appeals correctly held that the broadcasters were entitled, by long-standing common law rules and judiciai practices, to copy the White House tapes introduced in evidence at the *Mitchell* trial. We demonstrate by reference to extensive judicial and other authorities that the tapes which were introduced in evidence are as much a part of the judicial records of the *Mitchell* trial as are the docket sheets, pleadings and transcripts and, like any other public record, are subject to the public's right to inspect and copy such records while they are in the custody of the Clerk. The fact that the exhibits at issue in the present case are in the form of recorded material rather than documentary evidence is, we argue, of no consequence to and does not alter the public's common law right to inspect and copy such exhibits. We further demonstrate that, notwithstanding Mr. Nixon's submission to the contrary, the delicate constitutional issues raised by the contemporaneous recording of judicial proceedings are simply immaterial

to the broadcasters' present request to make copies of exhibits played in open court and introduced in evidence at such proceedings.

While it is not necessary, given the Court of Appeals' reliance on common law principles, for this Court to decide the question of whether the First and Sixth Amendments would, in and of themselves, require a finding that the refusal to allow the public to make copies of the tapes was unconstitutional, we demonstrate in Part II of our brief that First and Sixth Amendment considerations do add significant support to the opinion of the Court of Appeals. We argue that the First Amendment principles set forth in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975) with respect to the overriding importance to our democratic form of government of the reporting by the press, fully and accurately, about judicial proceedings and public court records demonstrate the necessity for affording considerable weight to First Amendment precepts in determining this appeal. We discuss the principles underlying the Sixth Amendment's provision for a "public trial" of criminal cases and demonstrate that one of the purposes of the "public trial" requirement, in addition to protecting the defendant's rights to a fair trial, is to afford the public the opportunity to observe and criticize the operation of its judicial institutions. We urge that such Sixth Amendment considerations, especially when viewed in the context of the *Mitchell* trial which is of such political and historical significance, require that copies of the White House tapes introduced in evidence be made available to the public generally.

In Part III of the brief, we set forth the basis for our submission that the Court of Appeals was entirely correct in its rejection of the potpourri of arguments advanced against permitting the broadcasters to copy the White

House tapes introduced in evidence. We discuss Mr. Nixon's argument based upon executive privilege and its dispositive rejection by both Judge Gesell and the Court of Appeals—namely, that the tapes played at the *Mitchell* trial, which were carefully reviewed by the District Court to remove all extraneous and sensitive comments prior to the introduction of the tapes in evidence, are by definition no longer confidential. We urge that the Court of Appeals' decision was entirely consistent with this Court's opinion in *United States* v. *Nixon*, 418 U.S. 683 (1974) in allowing the tapes to be publicly disseminated. We demonstrate the frailty of Mr. Nixon's arguments both with respect to his alleged "property" rights in the tapes and with respect to the amorphous privacy argument which he continues to make in the face of the incontrovertible fact that, as Judge Gesell concluded, "[Mr. Nixon's] words cannot be retrieved; they are public property. . . ." (Pet. App. 41a) Finally, we submit that Mr. Nixon's surprising reiteration of the argument based upon the potential prejudice to the defendants (none of whom are presently raising any objections to the broadcasters' request) arising out of the hypothetical possibility of retrials in the *Mitchell* case cannot overcome the public's right to copy the tapes played at the trial both because of this Court's recent denial of certiorari to the defendants in the *Mitchell* trial and because, as the Court of Appeals correctly observed, the tapes all consist of admitted evidence not likely to prejudice a hypothetical juror in any such hypothetical retrial.

ARGUMENT

I.

The Court of Appeals Correctly Held the Broadcasters Are Entitled, by Long-Standing Common Law Rule, to Copy the White House Tapes Introduced in Evidence

As both Judge Gesell and the Court of Appeals held*, the public's right to inspect and copy judicial records, including exhibits, is firmly established both at common law and in court rules.** What is at issue, the Court of Appeals stated, is a "precious common law right, one that predates the Constitution itself." (Pet. App. 15a)

In its determination that the common law right of the public to inspect and copy court records was controlling, the Court of Appeals concluded, "[t]his common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state."

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* The dissenting opinion of Judge MacKinnon in the Court of Appeals did not in the slightest disagree with this conclusion, but only with the reversal of Judge Sirica's refusal to make the tapes available until after this Court had disposed of—as it now has—the appeals from the convictions in the trials before Judge Sirica and until Mr. Mardian's status was clarified. On January 17, 1977, the Special Prosecutor announced his decision not to retry Mr. Mardian. (New York Times, Jan. 18, 1977, at 12, col. 6) Thus, Judge MacKinnon's conclusion that "[i]n my view, at this time, we should affirm Judge Sirica in his decision refusing to permit a reproduction of portions of the tape *exhibits* until the appeals in the relevant cases are decided and the criminal charges disposed of by a final judgment" (Pet. App. 26a; emphasis in original) can hardly be read as a dissent from any portion of the ruling of the Court of Appeals which is presented by this case.

** *See generally* H. Cross, *The People's Right to Know* 135-52 (1953); 20 Am. Jur.2d *Courts* §§ 61-62 (1965); 66 Am. Jur.2d *Records and Recording Laws* §§ 12-18 (1973); 76 C.J.S. *Records* § 36 (1952); Annot., *Restricting Access to Judicial Records*, 176 A.L.R. 1260-1268 (1948).

(Pet. App. 10a) As early as Lord Coke, jurists recognized the right of the public to inspect and copy court records:

> "These records, for that they contain great and hidden treasure, are faithfully and safely kept (as they well deserve) in the King's Treasury. And yet not so kept but that any subject may for his necessary use and benefit have access thereunto, which was the ancient law of England, and so is declared by an act of Parliament in 46 E 3." (Lord Coke, *Reports*, Vol. II, Preface)

Similarly, Greenleaf took notice of the common law right to inspect and copy judicial records as follows:

> "In regard to the inspection of public documents, it has been admitted from a very early period, that the inspection and exemplification of the records of the King's courts is the common right of the subject." (Greenleaf, *Evidence* § 457 (1899); emphasis added)*

The common law right to inspect "commonly carries with it the right to make copies without which the right

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* The common law right to inspect and copy judicial records is, as Judge Bazelon observed, simply an extension of the public's general common law right to inspect and copy public records. (Pet. App. 9a) (*See generally* the access-to-public-records cases referred to by Judge Bazelon at Pet. App. 9a, n.17.) Thus, as the Michigan Supreme Court noted in *Nowack* v. *Fuller*, 243 Mich. 200, 219 N.W. 749 (1928):

> "If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions." (219 N.W. at 750)

See also State ex rel. Colescott v. *King*, 154 Ind. 621, 57 N.E. 535 (1900) where the Supreme Court of Indiana concluded:

> "[T]here can be no sound reason advanced for depriving a citizen of this right; for it is evident that the exercise thereof [to inspect public records] . . . will serve as a check upon dishonest public officials, and will in many respects conduce to the betterment of the public service." (57 N.E. at 538)

to inspect would be practically valueless." *Direct Mail Service, Inc.* v. *Registrar of Motor Vehicles,* 296 Mass. 353, 5 N.E.2d 545, 546-47 (1937). *See also People ex rel. Gibson* v. *Peller,* 34 Ill. App.2d 372, 181 N.E.2d 376, 378 (1st Dist. 1962); *Garfield* v. *Palmieri,* 193 F.Supp. 137, 143 (S.D.N.Y. 1961) (dictum), *aff'd,* 297 F.2d 526 (2d Cir.), *cert. denied,* 369 U.S. 871 (1962); *Disabled Police Veterans Club* v. *Long,* 279 S.W.2d 220, 223 (Mo. Ct. App. 1955). As Judge Gesell observed in his December 5 Order:

> "As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records. *Ex parte Drawbaugh,* 2 App.D.C. 404, 407 (1894). *See also, United States* v. *Burka,* 289 A.2d 376 (1972); *Belt* v. *Pr. George's County Abstract Co.,* 73 Md. 289, 20 A. 982 (1890)." (Pet. App. 38a; emphasis in original)*

* As Petitioner rather grudgingly concedes (Pet. Br. 31), other federal district courts follow a similar practice with respect to allowing any applicants the right to inspect and copy all court records, including exhibits while in the custody of the Clerk. *See, e.g.,* D. Maine Rule 13:

> "Except upon order of Court, no paper or record on file with the Clerk, *including exhibits,* shall be removed from his custody, other than by authorized court personnel or for transmission to an appellate court; *but any person may inspect and copy such matter unless otherwise provided by statute, rule or order of Court.*" (emphasis added)

In response, Petitioner argues (Pet. Br. 19-23) that the common law right and court practices relied upon by Judge Gesell and the Court of Appeals do not include within their sweeping ambit those exhibits introduced in evidence which were obtained by a subpoena *duces tecum* because such materials "do not belong to the court at all, but are only in the court's temporary custody by virtue of compulsory process upon an individual or organization." (Pet. Br. 20) The Court of Appeals' terse response to this question-begging argument is dispositive:

> "To be sure, once a case is concluded, exhibits generally are returned to their owners, primarily because it is impractical to retain the exhibits in the courthouse. *But [Petitioner] has not offered a single reason for denying public access to exhibits while they are in the Clerk's custody.*" (Pet. App. 13a; emphasis added) (Footnotes omitted)

The cases cited by the Petitioner in support of his theory (Pet. Br. 21-23) are totally immaterial to the critical question raised by the Court of Appeals—namely, what reasons, if any, exist for overcoming the public's right to inspect and copy exhibits played in open court and introduced in evidence "while they are in the Clerk's custody."

See also C.D. Cal., Rule 29(e); E.D. Cal. Rule 4(b); N.D. Cal. Rule 5(e); S.D. Cal. Rule 29(b); E.D. Ill. Rule 18; N.D. Ind. Rule 19; S.D. Ind. Rule 16; E.D. Mich. Rule 26(7); N.D. Ohio Rule 11(e); N.D. Okla. Rule 16(d); W.D. Okla. Rule 15(d); W.D. Wisc. Rule 22. Significantly, even though some federal district courts do not appear to make any explicit written provision for the copying of exhibits, we have been unable to find *any* express prohibitions of such a practice in the local federal courts' rules. Moreover, no local federal court rule or practice with respect to the public's right to inspect and copy exhibits has been found which makes the operation of such a right dependent upon the distinction formulated in Petitioner's brief between documentary and non-documentary exhibits. (*See, e.g.,* Pet. Br. at 31-38)

(Pet. App. 13a) Thus, Petitioner inexplicably relies upon cases such as *Application of Kelly*, 19 F.R.D. 269 (S.D.N.Y. 1956) (Weinfeld, J.) (Pet. Br. 21) which set forth subpoenaed parties' and grand juries' rights of access to and possession of materials subpoenaed during and after their use at grand jury proceedings.* These grand jury cases are simply and totally inapposite to the broadcasters' rights to copy those exhibits in the custody of the Clerk which were played in open court and introduced in evidence in the *Mitchell* trial. Similarly immaterial are cases such as *United States* v. *Birrell*, 242 F.Supp. 191 (S.D.N.Y. 1965) (Pet. Br. 22, n.11) which discuss those situations in which a subpoenaed party may sometimes be permitted to comply with a subpoena *duces tecum* simply by attending grand jury or court proceedings with the subpoenaed materials. Such cases, even if they state the law accurately,** are obviously irrelevant to the public's common law right to copy judicial records while they are in fact in the custody of the court. In short, Petitioner's argument with respect to materials in the court's "temporary custody by virtue of compulsory process" (Pet. Br. 20) never responds to or even touches upon the Court of Appeals' search for a "single reason for denying

* *See, e.g., Application of Kelly, supra,* 19 F.R.D. at 270:

"Thus what is involved is a proper balance between the right of the grand jury to the 'temporary use of the books' and the right of a party to be protected against unreasonable and oppressive production of records which may be disruptive of its normal business activities . . . ." (footnote omitted)

See also Robert Hawthorne, Inc. v. *Director of Internal Revenue*, 406 F.Supp. 1098, 1129-33 (E.D. Pa. 1976); *Hale* v. *Henkel*, 201 U.S. 43, 75-77, 80 (1906) (Opinion of the Court; McKenna, J., concurring); *Application of Bendix Aviation Corp.*, 58 F.Supp. 953, 954 (S.D.N.Y. 1945).

** *See contra, Robert Hawthorne, Inc., supra,* 406 F.Supp. at 1131, n. 66. *See also* Fed.R.Crim. P. 17(c); *United States* v. *Nixon*, 418 U.S. 683, 697-702 (1974).

public access to exhibits *while they are in the Clerk's custody.*" (Pet. App. 13a; emphasis added)*

Judicial recognition of the public's common law right to inspect and copy all judicial records, including exhibits while in the custody of the court, may be found in *Sloan Filter Co.* v. *El Paso Reduction Co.*, 117 F. 504 (C.C.D. Colo. 1902).** In *Sloan Filter Co., supra,* the court held that an interested non-party to a patent dispute had the right to inspect and copy the *testimony and exhibits* on

* Petitioner's reliance in his brief (at 22) on *United States* v. *Monjar*, 154 F.2d 954 (3d Cir. 1946) is, as the Court of Appeals noted, "misplaced". (Pet. App. 12a-13a, n.28) The overriding concern of the court in *Monjar* related to questions of comity between the federal and state court systems. More specifically, the Court of Appeals held in *Monjar* that a Pennsylvania district attorney who was seeking various "books, documents and other exhibits" (154 F.2d at 955) obtained by subpoena *duces tecum* and introduced in evidence by the United States in a related federal trial held in the District Court of Delaware should be permitted to do so by proceeding in the state courts under the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings." (154 F.2d at 958-59) "Otherwise," the Court reasoned, "the delicate balance which comity has asserted hitherto in the courts of our dual system might be disturbed." (*Id.* at 959) Furthermore, the court's assertion in *Monjar* (made in the context of its discussion of comity) that the possession by the Clerk of exhibits was "at least in one sense, that of a mere custodian" (*id.* at 957) was immediately followed by the caveat that it "d[id] not intend to imply that the absolute control of exhibits introduced into evidence in a trial in a district court of the United States does not rest in that court." (*Id.* at 958) *See also Allen* v. *Lackey*, 199 Okla. 513, 188 P.2d 215, 217 (1947). There is simply nothing in the *Monjar* court's assertion that the Clerk's possession of the exhibits is "at least in one sense, that of a mere custodian" (154 F.2d at 957) to alter or compromise the public's "precious common law right" (Pet. App. 15a)—namely, that "judicial records, of which by statute and unvarying usage, *the custodian*, upon payment of the fee allowed by law, is bound to furnish copies." (*Brewer* v. *Watson*, 71 Ala. 299, 304 (1882); emphasis added)

** Significantly, the Petitioner's brief neither discusses nor cites the *Sloan Filter Co.* decision, despite the Court of Appeals' express reliance on the case. (Pet. App. 14a, n.33)

file in a patent infringement suit which the parties to the action had unsuccessfully sought to dismiss with a stipulation that would have barred such inspection rights. (117 F. at 506-07) The court concluded that:

> "[T]he matter of inspecting and taking copies of public records is as old in the law as the records are old. In English law, tenants of a manor could always inspect the court rolls and books of the manor in order to ascertain their titles. . . . So, also, where the authority of a mayor was in question, citizens could inspect the books and papers of the borough in order to determine the fact. . . . These cases and others support the common-law rule that a party may have inspection of any document or paper in which he may be interested. . . . In American reports cases may be found to the same effect." (117 F. at 506-07; citations omitted)*

* Nor have the courts limited the right to inspect and copy court exhibits to interested non-parties. In *In re Mosher*, 248 F.2d 956 (C.C.P.A. 1957), the Court considered a motion by a non-party who had no special interest in an appeal that was pending before the Court of Customs and Patent Appeals but who nevertheless desired a copy of the Patent Office Board of Appeals' decision. The motion was granted despite the absence of any special interest in the applicant on the grounds that, as the Court of Customs and Patent Appeals concluded:

> "[I]t is clear that at common law, no special interest had to be shown for a member of the public to gain access to judicial records, at least as far as a majority of the courts were concerned. *Access to such records was held to be an unqualified matter of right.*
>
> ". . . [S]tatutes conferring the right to inspect or use public records should be liberally construed in favor of inspection." (248 F.2d at 958-59; emphasis added) (Footnote omitted)

See also New York Post Corp. v. *Liebowitz*, 2 N.Y.2d 677, 143 N.E.2d 256, 163 N.Y.S.2d 409 (1957), where the New York Court of Appeals held that the plaintiff-newspaper had a right to receive a transcript of the trial judge's charge to the jury despite the fact that the trial had been open to the public and despite the fact that the newspaper was not a party to the action.

Other cases following the common law principles underlying the *Sloan Filter Co., supra,* opinion include *Ex parte Drawbaugh,* 2 App. D.C. 404 (1894), in which the court refused to seal any of the files relating to an appeal from the Patent Office to the Court of Appeals of the District of Columbia because such files were held to be subject to public inspection like those in any other case. The court there noted:

> "[A]ny attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice." (2 App. D.C. at 407-08)*

Similarly, in *Brewer* v. *Watson, supra,* where the plaintiff was denied access to public tax ledgers, the Alabama Supreme Court stated:

> "And the individual who claims access to public records and documents (*not judicial records, of which, by statute and unvarying usage, the custodian, upon payment of the fee allowed by law, is bound to furnish copies*) can properly be required to show that he has an interest in the document which is sought and that the inspection is for a legitimate purpose." (71 Ala. at 304; citations omitted) (emphasis added)

The right to inspect and copy judicial records—a right understood by the Court of Appeals to be "fundamental

* *See also United States* v. *Burka*, 289 A.2d 376 (D.C.App. 1972); and *In re Sackett*, 136 F.2d 248 (C.C.P.A. 1943) where the Court of Custom and Patent Appeals, citing *Drawbaugh, supra,* denied a motion to seal all the records in a case already decided by the Court against the movant.

to a democratic state" (Pet. App. 10a)—clearly encompasses the right to copy exhibits played in open court and introduced in evidence which are in the form of taped rather than documentary evidence. Both Judge Gesell, in his December 5 Order (Pet. App. 41a) and the Court of Appeals (Pet. App. 10a, n.21) explicitly rejected (and no judge in this case has yet to accept) Petitioner's argument made again to this Court (*see* Pet. Br. at 31-38) that, in enforcing the common law right to inspect and copy public records, courts should treat recorded materials differently from documentary records. As Judge Gesell held, "The law must be applied and the fact the evidence is in aural form is of no special consequence." (Pet. App. 41a)*

*Brief reference should be made to the hypothetical parade of horrors raised by Petitioner (*see, e.g.*, Pet. Br. at 35-37) which allegedly flow from the refusal of Judge Gesell and the Court of Appeals to recognize Petitioner's artificial distinction between documentary and non-documentary public records. The Court of Appeals responded to Petitioner's arguments as follows:

> "Appellee does point to examples of exhibits, such as pornographic movies and tapes of wiretapped conversations, that arguably should not be subject to public inspection. But while these hypotheticals may justify a power to deny public access in special cases, they do not justify a total ban on inspection." (Pet. App. 13a-14a) (Footnote omitted)

Furthermore, Petitioner's argument that the right to inspect and copy court exhibits would infringe on copyrights is simply inapposite. Since both films and books are of course statutorily protected under the copyright laws (17 U.S.C. §§ 1 *et seq.* (1970 & Supp. V 1975), no member of the public may copy such materials even if they are permitted either to be shown in open court or to be excerpted in the transcripts or opinions arising out of a judicial proceeding. *Marvin Worth Productions* v. *Superior Films Corp.*, 319 F. Supp. 1269, 1271 (S.D.N.Y. 1970). *See also Douglas International Corp.* v. *Baker*, 335 F. Supp. 282, 285 (S.D.N.Y. 1971).

As the *Marvin Worth*, *supra*, decision concludes, if such a theory were accepted, "James Joyce's *Ulysses*, for example, would lie within the public domain merely because the United States prosecuted the book. . . ." (*Id.* at 1271) There is surely nothing in the broadcasters' present request which even remotely suggests the possibility of supporting such a patently absurd result. Nor is

Petitioner further attempts to buttress his argument that "courts have drawn a sharp distinction between documentary materials and tape recordings" (Pet. Br. 32) by reference to various court decisions and district court rules which prohibit the tape or television recording of judicial proceedings themselves. (Pet. Br. 32-33, n.21) This case, however, does not now involve and never did involve any of the sensitive issues of fair trial and freedom of the press raised by the introduction of video and/or tape recording devices into the criminal trial process. The difficult issues raised by cases such as *Estes* v. *Texas*, 381 U.S. 532 (1965) are simply inapposite to this case. The broadcasters' request to copy the tape exhibits played in open court and introduced in evidence at the *Mitchell* trial never required (and surely does not now require) the District Court to allow the broadcasters to have access to the courtroom during the trial for the purpose of recording any portion of the proceedings and/or exhibits; indeed, from the outset, the broadcasters have sought only to be permitted to inspect and copy the tape exhibits in the custody of the Clerk in a manner that would not disturb the progress of the *Mitchell* trial. Thus, the broad policy and constitutional considerations set forth in cases such as *Estes*, *supra*, which have caused the courts to prohibit the televising and/or recording of certain judicial proceedings—namely, the alleged injection of irrelevant factors into court proceedings; the potential impact on jurors; the impairment of the quality of testimony in criminal trials; the additional responsibilities placed on the trial judge; the impact on the defendant (*see Estes*,

there anything in the broadcasters' submission which is inconsistent with the assertion by them or others (including the Petitioner) of rights, if any, under the copyright laws. The submission to the contrary in the Petitioner's brief (at 35-37) is inexplicable.

supra, 381 U.S. at 544-49)—are now and have been from the inception of this case totally immaterial to the broadcasters' request to copy the tape exhibits at the close of each day's session or, alternatively, at the end of the *Mitchell* trial and at a time and place convenient to the Clerk of the District Court and his staff.*

Moreover, the argument in Petitioner's brief that the rule against recording judicial proceedings is based, in part, "on the further consideration that commercial dissemination of aural recordings of a trial or an appellate argument would be undignified and would detract from the solemnity appropriate to judicial proceedings" (Pet. Br. 33-34) is not only irrelevant to the instant case for the reasons discussed above but also totally unsupported by any of the cases cited by the Petitioner. Once again, review of the cases referred to by Petitioner in support of his argument reveals their inapposite nature; not one of them either involves or even treats the question, which we believe in any case to be immaterial to the instant action, of the commercial dissemination of aural recordings of judicial proceedings.**

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* So that there is no possibility of misunderstanding, most broadcasters, including those submitting this brief, continue to believe that the *Estes* case was wrongly decided, and that, in any event, technology developed since the *Estes* ruling should now, in an appropriate case, lead to a different result. That issue, of course, is not presented by this case.

** *See* Pet. Br. at 33: *Amsler* v. *United States,* 381 F.2d 37, 53 (9th Cir. 1967) [defendant held not to have been denied a public trial by reason of trial judge's denial of his right to tape record the proceedings]; *Hudson* v. *State,* 108 Ga. App. 192, 132 S.E.2d 508, 511 (1963) [placing radio station's recording device near defendant and her counsel held to have "prejudice[d] the rights of the defendant to a fair and impartial trial and . . . hinder[ed] the defendant and her counsel in the conduct of her defense."]; *Bisignano* v. *Municipal Court,* 237 Iowa 895, 23 N.W.2d 523, 532 (1946) *cert. denied,* 330 U.S. 818 (1947) [recording and subsequent broadcast of contempt proceedings brought against petitioner, although not approved of by court, held not to prejudice nor violate petitioner's constitutional rights]; *State* v. *Cox,* 188 Kan. 500, 363 P.2d 528 (1961) [the permitting of recording and subsequent broadcast of the appointment of counsel and the setting of bond, although not approved of by the court, held not to be reversible error].

Similarly lacking in relevance or merit is Petitioner's reliance on rules promulgated in a number of federal district courts which prohibit the copying of tape recordings made by court reporters during the course of judicial proceedings. (Pet. Br. 34-35, nn. 24 & 25) As the relevant statute (28 U.S.C. § 753(b) (1970)) and legislative history reveal (1965 *U.S. Code Cong & Ad. News* 2905), such tape recordings by court reporters have been permitted by Congress only for the limited purpose of augmenting the accuracy of reporters' stenographic transcriptions so as "to safeguard the rights of individuals before the court." (*Id.* at 2906) We reiterate that the broadcasters do not seek nor have they ever sought in this case the right to tape or make copies of any tapes (if they exist) of the actual proceedings of the *Mitchell* trial. The considerations giving rise to judicial prohibitions of copying court reporters' tape recordings of court *proceedings* are therefore immaterial to the instant request by the broadcasters to copy tape *exhibits* played in open court and introduced in evidence at the *Mitchell* trial.

Additional judicial support for the rejection in the opinions of both the Court of Appeals and Judge Gesell of Petitioner's artificial distinction between documentary and non-documentary public records may be found in cases such as *Menge* v. *City of Manchester,* 113 N.H. 533, 311 A.2d 116 (1973), in which the Supreme Court of New Hampshire permitted copying of taped public records although identical written records were available, and *Ortiz*

v. *Jaramillo*, 82 N.M. 445, 483 P.2d 500 (1971), in which the Supreme Court of New Mexico held that the county chairman of a political party was entitled to be furnished with a copy of a magnetic tape of the county's voter registration records even though a written record also existed. The court in *Ortiz* noted:

> "We are unable to understand why the right to inspect public records should not carry with it the benefits arising from improved methods and techniques of recording and utilizing the information contained in these records, so long as proper safeguards are exercised as to their use, inspection and safety.
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> • • •
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> "We fail to understand how it can be said the inspection and copying of information contained on a printed and written affidavit of registration, which is a public record, is proper, but the inspection and copying of this identical information from the 'working master record' tape, which is also a public record, constitutes an invasion of the privacy of the individual named in and identified by this information. Nothing said or reasonably suggested in MacEwan v. Holm, 226 Or. 27, 359 P.2d 413, 85 A.L.R.2d 1086 (1961), cited by respondent, supports any claim that the information contained in a written public record becomes confidential, or cloaked with a protection of privacy, upon being converted into a reproducible form on a magnetic tape, which is also a public record." (483 P.2d at 501-02)

Further support for the rulings by Judge Gesell and the Court of Appeals may be found in both the Federal Rules of Appellate Procedure, which clearly establish that

exhibits are judicial records,* and the *Manual for the Clerks of the United States District Courts* prepared by the Judicial Conference pursuant to its authority under 28 U.S.C. § 457 (1970). The *Manual* specifically provides for the retention of all materials accumulated during the course of "cases involving crimes of significance in the history of the country. . . ." (*Manual, supra*, Exhibit 2 (Ref. 1301.4) at p. 2 (1954)) Such a category of cases is, as Judge Bazelon concluded, "a category into which the Watergate case readily falls." (Pet. App. 12a; footnote omitted) As the *Manual* explains:

> "The dockets and minutes of the court and the dockets of the commissioners and magistrates and of the grand juries, as arms of the court, provide a complete summary of criminal proceedings and should in no case be disposed of. *To secure a more complete picture of proceedings and incidence of crime than is afforded*

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* The Federal Rules of Appellate Procedure explicitly include all exhibits, *including non-documentary exhibits*, as part of the judicial records of the District Court. Thus, Rule 10(a) of the Federal Rules of Appellate Procedure provides that:

> "(a) Composition of the Record on Appeal. *The original papers and exhibits filed in the district court*, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court *shall constitute the record on appeal in all cases.*" (emphasis added)

Fed.R.App.P. 11(a) provides, *inter alia*, that,

> "The record on appeal, *including the transcript and exhibits necessary for the determination of the appeal*, shall be transmitted to the court of appeals . . . ." (emphasis added)

Fed.R.App.P. 11(b) provides, *inter alia*, that,

> "Documents of unusual bulk or weight and *physical exhibits other than documents* shall not be transmitted by the clerk unless he is directed to do so by a party or by the court of appeals." (emphasis added)

See also Allen v. *Lackey, supra*, where the Supreme Court of Oklahoma noted that exhibits "are a part of the court's records and as such are in the custody of and subject to the control of the court." (188 P.2d at 217)

by the docket and minute entries, in those cases involving crimes of significance in the history of the country a full record of the case should be retained. This schedule provides for the retention of cases of continuing value as documentation of significant historical movements in the country and of the development of and variations in judicial procedures in the criminal area of the trial courts. It provides for the disposal of all other cases filed since December 31, 1911." (*Id.* at p. 2) (emphasis added)*

As both Judge Gesell and the Court of Appeals correctly held, such strongly worded guidelines must supersede the normally applicable local rules of the District Court for the District of Columbia cited in the Petitioner's brief (at 20, n.9) which permit the Clerk to "destroy or otherwise dispose of those exhibits" which a party fails to repossess at the conclusion of a case. *Rules of the United States District Court for the District of Columbia*, Rule 2-10(d). It understates the point to say that reliance upon such a rule by Mr. Nixon evinces a total disregard for the magnitude and historical significance of the crimes

* In the Schedule incorporated by reference in the *Manual*, the clerks are explicitly ordered not to dispose of the following kinds of records described as "Records of Continuing Value":

"6. Case papers and documentary exhibits filed with cases of crime or conspiracies to commit crimes, including related misprisons and accessories after the fact and court reporters' transcripts of proceedings whether filed in or outside the case file, consisting of items a-k below. . . .

a. *Crimes involving the President and Vice President of the United States, members of and delegates to Congress, judges and other officers appointed by the President*, States and territorial governors and *cabinet officials*, agents of foreign states, prisoners of war, internees, alien enemies, and persons aiding in the escape of or harboring internees, prisoners of war, or enemy aliens." (*Manual*, *supra* at pp. 4-5, item 6(a); emphasis added)

held by the jury in the *Mitchell* trial to have been committed by the defendants.*

As the foregoing discussion demonstrates, there is overwhelming support at common law and in local court rules in support of permitting the copying and later broadcasting to the public of the tapes introduced as court exhibits in the *Mitchell* trial. As the Court of Appeals concluded:

> "Appellants seek to vindicate a precious common law right, one that predates the Constitution itself. While the courts have sanctioned incursions on this right, they have done so only when they have concluded that 'justice so requires.' To demand any less would demean the common law right." (Pet. App. 15a) (Footnotes omitted)

II.

The Decision of the Court of Appeals Is Consistent With First and Sixth Amendment Precepts

In light of its reliance on common law principles, the decision of the Court of Appeals did not reach the question of whether the First or Sixth Amendments would, in and of themselves, require a finding that the refusal to make the tapes publicly available was unconstitutional. Nor, in light of the Court of Appeals' decision, do we believe this Court need reach that question. However, we do submit that First and Sixth Amendment considerations add considerable weight to the opinion of the Court of

* "Nor", as the Court of Appeals correctly observed, "has [Petitioner] justified classifying documentary exhibits in historically significant cases as judicial records but denying that classification to non-documentary exhibits in such cases or to all exhibits in cases not of historical impact." (Pet. App. 13a)

Appeals and, on that basis, urge the Court to consider them in reviewing this case.*

The First Amendment

The First Amendment principles which we believe should guide this Court with respect to this application were set forth most recently by the Court in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). In that case, the Supreme Court of Georgia had held that the father of a deceased rape victim could recover damages for invasion of privacy against a broadcaster on the basis of its identification of the rape victim in its news coverage. *Cox Broadcasting Corp.* v. *Cohn*, 231 Ga. 60, 200 S.E.2d 127 (1973). In its opinion, the Georgia Court had held that "[t]here simply is no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection." (200 S.E.2d at 134) Notwithstanding the claims of privacy raised in that case, this Court reversed. In Justice White's opinion for the Court, he observed that:

> "In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and

* If this Court were to differ with the Court of Appeals as to the nature of the common law rules at issue, we would urge it to consider the above constitutional arguments, each of which was made from the time the broadcasters first filed their initial application with Judge Sirica (App. 12-13), as a separate and independent basis for affirming the ruling of the Court of Appeals.

> documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. *With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.* See *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966)." (420 U.S. at 491-92; emphasis added)

And that:

> "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. *Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.* In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." (420 U.S. at 495; emphasis added)

Cox Broadcasting thus demonstrates the need for affording extraordinary weight to First Amendment considerations in the Court's determination of this appeal. If the

broadcasting of the name of a deceased rape victim contained in court records is "a public benefit" and the freedom to broadcast that information is "of critical importance to our type of government", surely the broadcasting of the White House tapes introduced in evidence in the *Mitchell* trial is no less so—and, in fact, far more so. And, if a duly adopted state statute designed to afford privacy to rape victims and their families cannot withstand First Amendment scrutiny in situations in which the names of the victims are contained in court records, it is difficult to comprehend how a judicial ban on release of publicly played court exhibits can withstand such scrutiny.

To this, Mr. Nixon responds by observing (accurately but irrelevantly) that the Georgia statute at issue in *Cox* "did not bar the Court from disclosing the rape victim's name" and that the restraint in *Cox* "was one on publication of information that the television station already had or could readily obtain from public records." (Pet. Br. 43) The missed point, however, is that in this case as well, the "information" sought is contained in the public court records.

Nor may *Cox Broadcasting* be distinguished on the ground that in it this Court reserved judgment as to a "refusal of access to official court records, 420 U.S. at 496 n.26." (Pet. Br. 43) What the Court reserved decision on was the constitutionality of state policies prohibiting *any* access to certain types of records historically kept closed—*e.g.*, juvenile proceedings* or the like. What the Court did not reserve decision on was the right of the press to broadcast information obtained from openly kept court

* In *Oklahoma Publishing Co.* v. *District Court*, 97 S.Ct. 1045 (1977) the Court made clear that when such proceedings are held in public, there may be no restrictions as to what is printed with respect to them.

records, even though powerful competing societal claims could be made that such records should not be broadcast and even though "sensibilities" would be disturbed by their broadcast. Precisely the same reasoning should, we believe, lead to the conclusion that the broadcasting of the tape exhibits should not be barred when the exhibits themselves are, and have been, open to the public.*

Judge Gesell's opinion rejected the broadcasters' First Amendment argument (prior to the *Cox Broadcasting* ruling) on the ground that cases such as *Pell* v. *Procunier*, 417 U.S. 817 (1974), which held that the press had no unique right of "access" to prisons to interview inmates, demonstrated that the press had no First Amendment right of access to the court exhibits in this case. (Pet. App. 37a-38a) *Cox* aside, the difference between the cases is, in our view, precisely the difference between courtrooms and prisons. The press and the public generally have a long recognized right to access to courtrooms, to court exhibits and the like—and "to report whatever occurs in open court. . . ." *Estes* v. *Texas, supra*, 381 U.S. at 541-42; *Craig* v. *Harney*, 331 U.S. 367, 374 (1947). But prisons are not freely "open" to the public or the press and the holding of this Court in *Pell* is no more than that they need not be opened at the request of the press.

In fact, to cite *Pell* as authority for the denial of "access" to court records is to read it in a fashion contrary to the

* The suggestion of Mr. Nixon (Pet. Br. 41) that the broadcasters' First Amendment claim is one seeking "'the unrestrained right to gather information'", as in *Zemel* v. *Rusk*, 381 U.S. 1, 16-17 (1965) is simply inexplicable in the context of a case involving public court records. So too is the suggestion that the broadcasters are asking the Court not for access to public court records, but for the "court to provide . . . reproductions" of the tapes (*id.*); the broadcasters have never asked the court to reproduce for them the tape exhibits at issue, but simply to *permit* reproduction of those exhibits.

holding of this Court in *Cox Broadcasting* that:

> "With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." (420 U.S. at 492)

If this Court had believed the words "prisons" could properly have been substituted for the words "judicial proceedings" and "trials", we submit that the *Pell* ruling would unanimously have been decided in the manner urged by the dissenting justices; that the majority did not so agree hardly suggests that the press and the public may now be relegated to the limits on trial coverage that exist with respect to prison coverage.

The Sixth Amendment

Judge Gesell's decision of December 5, 1974 concluded that the Sixth Amendment lent support to his conclusion that "the public should have the opportunity to hear [the tapes]." As phrased by Judge Gesell:

> "The courts are a branch of government and a criminal proceeding involving officials holding high positions of public trust must peculiarly remain open for the closest scrutiny and discussion by citizens. It was in just such situations that the Sixth Amendment was intended to have its greatest thrust. As the Supreme Court has succinctly stated, 'what transpires in the courtroom is public property.' *Craig* v. *Harney*, 331 U.S. 367, 374 (1947). Only in this fashion can arbitrary judicial authority be prevented." (Pet. App. 42a)

We believe Judge Gesell's decision was, in this respect, wholly correct. The Sixth Amendment to the Constitution

provides for "public trial" of criminal cases. As such it requires that the state, in a criminal prosecution, conduct the trial in a forum open to members of the public who wish to attend. *Davis* v. *United States*, 247 F. 394 (8th Cir. 1917). One purpose of the right is to protect defendants against the evils of the Star Chamber. A broader —and also long-recognized—purpose is that of permitting the public to know continually and contemporaneously what transpires in its courts. As one district court has observed, "Public trial is essentially a right of the accused. . . . There is, however, a correlative right to preserve the public's right to be informed about criminal prosecutions in the best interests of all citizens." *United States ex rel. Mayberry* v. *Yeager*, 321 F.Supp. 199, 204 (D.N.J. 1971). *See also State ex rel. Dayton Newspapers, Inc.* v. *Phillips*, 46 Ohio 457, 351 N.E.2d 127, 133-34 (1976).

Sixth Amendment rights have thus often been vindicated in actions commenced by the press, as well as by a threatened defendant. *See, e.g., Gannett Co. Inc.* v. *DePasquale*, 55 App. Div. 2d 107, 389 N.Y.S.2d 719 (4th Dept 1976); *Oliver* v. *Postel*, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S. 2d 407 (1972)*; *E. W. Scripps Co.* v. *Fulton*, 100 Ohio App. 157, 125 N.E.2d 896 (1955); *Phoenix Newspapers, Inc.* v. *Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966); *Phoenix Newspapers, Inc.* v. *Jennings*, 107 Ariz. 557, 490 P.2d 563 (1971); *Johnson* v. *Simpson*, 433 S.W.2d 644 (Ky. 1968). And in numerous other cases, the public's right to a public trial has been held to govern over a defendant's desire for a less open trial. *See, e.g., State* v. *Allen*, 73 N.J. 132, 373 A.2d 377 (1977); *Lyles* v. *State*, 330 P.2d 734 (Okla. Crim. App. 1958); *Cox* v. *State*, 3 Md.

* The *Postel* decision suggests that there is considerably less vitality in cases such as *People* v. *Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954) and *United Press Associations* v. *Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954) than Petitioner appears to believe there is.

App. 136, 238 A.2d 157 (Spec. App. 1968); *People* v. *Holder*, 70 Misc.2d 31, 332 N.Y.S.2d 933 (Sup.Ct. Queens Co. 1972). *See also In re Oliver*, 333 U.S. 257, 270 (1948). As summarized by the Court in *Oxnard Pub. Co.* v. *Superior Court*, 68 Cal. Rptr. 83, 91-92 (Ct. App. 1968):

> "A properly-conducted public trial, in addition to serving the interest of the accused and his connections and the interest of the victim and his connections, maintains the confidence of the community in the honesty of its institutions, in the competence of its public officers, in the impartiality of its judges, and in the capacity of its criminal law to do justice. Public trial has been a basic tenet of our legal heritage, at least since the abolition of the Star Chamber three hundred years ago. Secrecy, on the other hand, is the antithesis of the orderly operation of a public institution, breeding either suspicion, distrust, rumor, and outrage, or apathy, indifference, and neglect. Suppose a charge of bribery against a state senator, tax assessor, or member of Congress; suppose a charge of conflict of interest against a councilman, supervisor, or commissioner; suppose the prosecution of the spouse of a judge or the relative of a prominent politician. In each of these cases public confidence in the administration of justice is directly served by the procedure of an open trial which exposes to the scrutiny of the public the conduct of the case and the actions of public officers, police, prosecutors, and trial judge in the performance of their duties. By following the course of events the public is able to evaluate the competence and fairness with which the case is handled. At the conclusion of such a trial deficiencies or excesses in the conduct of public affairs have been exposed for remedial action, and, normally, the public is satisfied that the matter has received an equitable and proper disposition."

The requirement imposed by the Sixth Amendment to conduct a public trial is subject only to the narrowest limitations. A court may—within certain narrowly defined limits—exclude certain members of the public from a trial under special circumstances and for limited periods of time related to the purpose of the exclusion. Thus, recognized purposes which may be served by the exclusion of certain members of the public are preserving courtroom order, *United States* v. *Kobli*, 172 F.2d 919, 922 (3d Cir. 1949); *United States ex rel. Orlando* v. *Fay*, 350 F.2d 967, 971 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966); *Davis* v. *United States*, *supra*, 247 F. at 395 (1917); insuring the safety of the witness and parties, *United States ex rel. Smallwood* v. *LaVallee*, 377 F. Supp. 1148 (E.D.N.Y. 1974), *aff'd*, 508 F.2d 837 (2d Cir.), *cert. denied*, 421 U.S. 920 (1975); *People* v. *Devine*, 80 Misc.2d 641, 364 N.Y.S.2d 71 (Sup. Ct. Kings Co. 1974); *People* v. *Hinton*, 31 N.Y.2d 71, 73-77, 286 N.E.2d 265, 334 N.Y.S.2d 885, 887-89 (1972), *cert. denied*, 410 U.S. 911 (1973); *People* v. *Hagan*, 24 N.Y.2d 395, 397-99, 248 N.E.2d 588, 300 N.Y.S.2d 835, 837, *cert. denied*, 396 U.S. 886 (1969); *United States ex rel. Bruno* v. *Herold*, 408 F.2d 125, 127 (2d Cir. 1969), *cert. denied*, 397 U.S. 957 (1970); and protecting the morals of the public, *United States* v. *Kobli*, *supra*. *See also United States* v. *Lopez*, 328 F. Supp. 1077, 1087-88 (S.D.N.Y. 1971). These exceptions, however, are carefully defined and must be sparingly applied. As the Court of Appeals for the Third Circuit has concluded:

> "It has always been recognized that any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity." (*United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599, 607 (3d Cir. 1969))

Of course, we have never suggested—and we do not now—that Judge Sirica in any sense, conducted the *Mitchell* trial in a secret or closed manner. However, we do urge upon the Court the proposition, as initially set forth by Judge Gesell, that the Sixth Amendment requires that court exhibits be made available to the public generally —and not be limited to those who are fortunate enough to be permitted to attend in the courtroom. In considering the correctness of the ruling of the Court of Appeals and of Judge Gesell that the tapes should be heard by the public, Sixth Amendment considerations, as well as those stemming from the First Amendment, may and should be considered by this Court.

III.

The Court of Appeals Correctly Rejected Arguments Made Against Permitting the Broadcasters to Copy the White House Tapes Introduced in Evidence.

The decision of the Court of Appeals recognized that the right to inspect and copy court records, including exhibits, was not an absolute one. It therefore carefully considered each of the arguments then asserted against the broadcasters' application, rejecting each of them. In all respects, we believe the decision of the Court of Appeals as to each of these arguments was correct.

1. *The Argument Based Upon Executive Privilege*

The argument asserted most vigorously and at greatest length in Mr. Nixon's brief has been asserted by him, in one or another form, since the commencement of this proceeding. In its current form, the argument is that the "deference" due subpoenaed presidential materials makes

distribution of these tapes "inappropriate". (Pet. Br. 47) Judge Gesell's response to this submission was as follows:

> "Former President Nixon is before the jury as an alleged co-conspirator and his acts, as reflected in the tapes, are pertinent to the theory of the case on which the Special Prosecutor is proceeding. The Court has carefully reviewed transcripts of the tapes in issue. From this review it is apparent that Judge Sirica has assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial. Only portions of the tapes strictly germane to the criminal proceeding have been played to the jury. Moreover, the portions of the tapes here in issue are now of public record. Although former President Nixon has been pardoned, he has standing to protest release by the Court but he has no right to prevent normal access to these public documents which have already been released in full text after affording the greatest protection to presidential confidentiality 'consistent with the fair administration of justice.' *United States* v. *Nixon, supra,* 94 S.Ct. at 3111. His words cannot be retrieved; they are public property and his opposition is accordingly rejected." (Pet. App. 40a-41a)

The Court of Appeals, concluding that Judge Gesell had not abused his discretion in so ruling, observed that:

> "In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court spoke of the 'high degree of deference' owed to Presidential conversations. The context of the Supreme Court's statements, however, make clear that its primary concern was with safeguarding the *confidentiality* of such conversations, in order to pro-

vide 'protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.' Thus the Court stated,

> '[T]he District Court has a very heavy responsibility to see to it that Presidential conversations, *which are either not relevant or not admissible,* are accorded that high degree of respect. . . .'

And again:

'[T]he District Judge will at all times accord to Presidential records that high degree of deference . . . and *will discharge his responsibility to see to it that until released to the Special Prosecutor no in camera material is revealed to anyone. This burden applies with even greater force to excised material. . . .*'" (Pet. App. 24a-25a; emphasis in original) (Footnotes omitted)

Since the tapes played at trial are, by definition, not confidential, the Court of Appeals concluded that it was consistent with this Court's ruling in *United States* v. *Nixon* for the tapes to be publicly disseminated.*

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* This Court's recent rejection of Mr. Nixon's claims of executive privilege in *Nixon* v. *Administrator of General Services,* 45 U.S.L.W. 4917 (U.S. June 28, 1977) demonstrates the validity of both Judge Gesell's and the Court of Appeals' reading of *United States* v. *Nixon, supra,* in rejecting Mr. Nixon's claims of Presidential privilege in the present case. In *Nixon* v. *Administrator of General Services, supra,* the Court was called upon to adjudicate Mr. Nixon's claim of Presidential privilege "only with respect to the process by which the materials will be screened and catalogued by professional archivists." (45 U.S.L.W. at 4924) In holding that the Presidential Recordings and Materials Preservation Act ("Act") did not violate the Presidential privilege asserted by Mr. Nixon, the Court clearly demonstrated that its primary concern in *United States* v. *Nixon* was with protecting the confidentiality of sensitive Presidential conversations found on those tapes which had been subpoenaed in connection with the *Mitchell* trial. Indeed, the Court explicitly analogizes the screening process provided for by the Act to the *in camera* inspection employed by the District Court in the *Mitchell* trial, concluding "that the screening process contemplated by the Act will not constitute a more severe intrusion into *Presidential confidentiality* than the *in camera* inspection by the District Court approved in *United States* v. *Nixon*. . . ." (45 U.S.L.W. at 4925; emphasis added) Furthermore, the Court concluded "there is no reason to believe that the restriction on public access ultimately established by regulation will not be adequate to preserve *executive confidentiality*". (45 U.S.L.W. at 4924; emphasis added) Since the interests in "executive confidentiality" (*id.*) which have been considered by this Court in *United States* v. *Nixon, supra,* and *Nixon* v. *Administrator of General Services, supra,* have already been satisfied in the present case by reason of the District Court's initial screening of the tapes prior to their introduction in evidence at the *Mitchell* trial, Mr. Nixon's claim of executive privilege is utterly unfounded.

To all this, Mr. Nixon urges that broadcasting the tapes "will constitute a far more serious intrusion on the sensibilities of those whose voices appear on the tapes than any publication of transcripts or reporting of their contents." (Pet. Br. 50) So that issue may be joined with precision, we agree that broadcasting the tapes may be more offensive to the "sensibilities" of those whose voices are heard in conversations deemed admissible to prove their participation in a criminal conspiracy.* We simply do not believe deference to such sensibilities can properly overcome the overriding interest of the public in learning what took place in the White House when the taped conversations occurred or what transpired at the *Mitchell* trial when the taped conversations were introduced in evidence. Nor do we believe that an unindicted co-conspirator who tapes his conversations with his con-

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* It is true that those individuals—including the head of a foreign state—that Mr. Nixon chose to insult in crude and vulgar language on the tapes may indeed resent Mr. Nixon's slurs. The insults are, in any event, already public knowledge and while repetition may well be distressing, such distress can hardly be deemed sufficient cause to bar the public from hearing the court exhibits.

federates (some of whom are later convicted of crimes which are proved by the tapes themselves) stands in the most appealing position to protest intrusions into the sensibilities of anyone.

The tapes at issue in this case are unique documents of preeminent historical—and current—interest. The remarkable number of books, articles, movies and television shows which the Watergate affair has yielded stands as testimony to the abiding interest of the public in materials which in some way explain why and how Watergate occurred.* The overriding historical importance of the tapes has been recognized by Congress and cited by this Court as at least one appropriate basis for Congressional passage of the Presidential Recordings and Materials Preservation Act. *Nixon* v. *Administrator of General Services, supra*, 45 U.S.L.W. at 4924-25. In light of the importance of the materials in question to the public's ability to understand the past and thus act to prevent similar occurrences in the future, Petitioner's expressed sensitivity to the privacy of those he surreptitiously recorded is of little persuasive weight.

2. *The Arguments of "Property" Rights*

An additional argument proffered by Mr. Nixon relates to his supposed personal "property" rights in the tapes. No claim of ownership of the tapes is made in this case by Mr. Nixon; instead the far more amorphous claim of a

* *See e.g.*, W. Safire, *Before the Fall* (1975); T.H. White, *Breach of Faith: The Fall of Richard Nixon* (1975); J. Breslin, *How The Good Guys Finally Won: Notes from an Impeachment Summer* (1975); J. Dean, *Blind Ambition* (1976); L. Jaworski, *The Right and The Power* (1976); J. Lukas, *Nightmare: The Underside of the Nixon Years* (1976); F. D. Thompson, *At That Point in Time: The Inside Story of the Senate Watergate Committee* (1975); R. Woodward and C. Bernstein, *The Final Days* (1976).

"property interest" is asserted.* (Pet. Br. 24-26) It is an "interest" based on cases so inapposite that their very nature demonstrates the frailty of the claim.

For example, "perhaps the closest reported case on its facts to this one" (Pet. Br. 25) is said to be *King* v. *King*, 25 Wyo. 275, 168 P. 730 (1917). *King* v. *King* involved a marital dispute in which apparently amorous and surely compromising letters written by a husband were intercepted by his wife; they were introduced under seal in their divorce proceedings. After the proceeding was completed, the former wife sought—and was denied—the right to copy the sealed, intimate exhibit for the purpose of exposing her former husband's misdeeds to a secret organization he belonged to called the "Eastern Star Lodge." It understates the point to observe that were *King* v. *King* actually the "closest reported case on its facts to this one", it could surely be said that this is a case of first impression.

Other cases relied upon by Mr. Nixon to establish property rights are also inapposite. Three statutory copyright cases are relied upon, each of which involved serious creative efforts by the party asserting the right.** Typical

* The determination of whether or not Mr. Nixon has legal title to the tapes was not decided by this Court in its recent decision in *Nixon* v. *Administrator of General Services, supra*, because it was deemed "irrelevant". (45 U.S.L.W. at 4922, n.8) As the Court observed:

> "We see no reason to engage in the debate whether [Mr. Nixon] has legal title to the materials. . . . Such an inquiry is irrelevant for present purposes because [the Act] assures [Mr. Nixon] of just compensation if his economic interests are invaded, and even if legal title is his, the materials are not thereby immune from regulation." (45 U.S.L.W. at 4922, n.8)

** *King* v. *Mister Maestro, Inc.*, 224 F.Supp. 101 (S.D.N.Y. 1963); *Columbia Broadcasting System, Inc.* v. *Documentaries Unlimited, Inc.*, 42 Misc.2d 723, 248 N.Y.S.2d 809 (Sup.Ct. N.Y.Co.

is the well-known copyright case of *Metropolitan Opera Ass'n, Inc.* v. *Wagner-Nichols Recorder Corp., supra,* which concluded that:

> "To refuse to the groups who expend time, effort, money and great skill in producing these artistic performances the protection of giving them a 'property right' in the resulting artistic creations would be contrary to existing law, inequitable, and repugnant to the public interest. . . . Equity will not bear witness to such a travesty of justice; it will not countenance a state of moral and intellectual impotency." (199 Misc. at 882, 101 N.Y.S.2d at 497-98).

We think we do Mr. Nixon and his associates no injustice if we urge that the "artistic creations" reflected on the White House tapes are distinguishable by their nature from those involved in the Metropolitan Opera.*

1964); *Metropolitan Opera Ass'n, Inc.* v. *Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup.Ct. N.Y.Co. 1950). (Pet. Br. 24)

* This Court's recent decision in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 45 U.S.L.W. 4594 (U.S. June 28, 1977) is similarly inapposite to the instant case. In *Zacchini, supra,* this Court held that the news media are not constitutionally privileged under the First and Fourteenth Amendments to broadcast an entertainer's entire act (*Zacchini* involved a 15 second "human cannonball" act) on a news program without his consent and without providing compensation. In language which clearly underscores the nature of the differences between the amorphous "property interests" asserted by the Petitioner in the present case and those property interests involved in the *Zacchini* decision, the Court explained its holding as follows:

> "The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance. As the [lower] court recognized, *this act is the product of petitioner's own talents and energy, the end result of much time, effort and expense.* Much of its economic value lies in the 'right of exclusive control over the publicity given to his performance'; if the public can see the act for free on television, they will be less willing to pay to see it at the fair.

Nor do cases involving the conceded property right in private letters (Pet. Br. 24-25) advance or bear on this case.* Such cases do not involve court records or exhibits; they do not involve letters introduced into evidence (excepting only the salacious letters intercepted by Mrs. King in *King* v. *King*); they are simply irrelevant to this case.

> [Footnote omitted.] The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. . . . *Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer.* Thus in this case, [the State] has recognized what may be the strongest case for a 'right of publicity'—*involving not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.*" (45 U.S.L.W. at 4957) (emphasis added)

An additional consideration distinguishing the policies underlying the *Zacchini* decision from those which should govern the instant case may be found in this Court's recognition in *Zacchini* that the protection of a performer's right of publicity "provides an economic incentive for him to make the investment required to produce a performance of interest to the public." (45 U.S.L.W. at 4957) It is certainly beyond dispute that the present case does not require this Court to provide any such incentives to the Petitioner.

* However, as this Court was careful to observe in *Nixon* v. *Administrator of General Services, supra,* "[*i*]*t has been accepted* at least since Mr. Justice Story's opinion in *Folsom* v. *Marsh*, 9 Fed. Cas. 342, 347 (1841), that *regardless of where legal title lies,* 'from the nature of the public service or the character of the documents embracing historical, military or diplomatic information, it may be the right, and even the duty of the government, to give them publicity, *even against the will of the writers.*'" (45 U.S.L.W. at 4922, n.8; emphasis added)

In *Folsom* the court held the assignees to be possessors of presidential letters protected by copyright. However, the *Folsom* court determined that even such an otherwise valid statutory copyright claim may be subordinated to an overriding public interest in copyrighted materials. If a statutory right may be so subordinated, it should hardly be doubted that a spongy non-statutory claim such as the one Mr. Nixon asserts in this case must also give way.

3. *The Privacy Argument*

Despite the fact that the White House tapes at issue herein are public records which were played in open court and introduced in evidence in the *Mitchell* trial, Mr. Nixon makes the privacy argument to this Court which he has made unsuccessfully from the outset of this case—namely, that he "retains a privacy interest in the taped conversations, which would be infringed if aural copies of the conversations were publicly distributed."* (Pet. Br. 26)

A basic assumption underlying Mr. Nixon's privacy argument is the assertion that "Mr. Nixon plainly had a protectable privacy interest in the tapes prior to their use in the criminal trial." (Pet. Br. 27) But the Court's recent discussion of Mr. Nixon's privacy claims in *Nixon* v. *Administrator of General Services, supra,* seriously undercuts this cornerstone of Mr. Nixon's privacy argument in the present case. First, while it is true that this Court in *Nixon* v. *Administrator of General Services, supra,* recognized that "at least when government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights *in matters of personal life unrelated to any acts done by them in their public capacity*" (45 U.S.L.W. at 4926; emphasis added), it is beyond dispute that the White House tapes which were initially screened by the District Court and subsequently introduced in evidence at the *Mitchell* trial are related entirely to Mr. Nixon's official conduct of his Presidency and do not in any way infringe or touch upon "matters of personal life unrelated to any acts done by [Mr. Nixon] in [his] public capacity." (*Id.*) Indeed,

* As the Court of Appeals observed, Petitioner has conceded that the infringement of such an amorphous "privacy interest" could not be the basis of a cause of action of Mr. Nixon or others for invasion of privacy. (*See* Pet. App. 22a, n.54)

this Court has noted that such matters involved "only a small fraction of the materials of [Mr. Nixon's] Presidency. . . ." (45 U.S.L.W. at 4926) Thus, those narrowly defined privacy expectations of the Petitioner in his personal communications which this Court recognized in *Nixon* v. *Administrator of General Services, supra*—namely, "'private communications between [him] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends as well as personal diary dictabelts and his wife's personal files'" (45 U.S.L.W. at 4926; citation omitted)—are totally immaterial to Mr. Nixon's privacy claims in the present case.

Even more telling is this Court's rejection of Mr. Nixon's privacy arguments as to the tapes Mr. Nixon has already revealed to the public. Thus, the Court stated with respect to such disclosed materials that "of course, [Mr. Nixon] cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public." (45 U.S.L.W. at 4926) Mr. Nixon is thus barred from asserting any privacy claims in the present case as to those portions of the taped exhibits introduced in evidence at the *Mitchell* trial—the only tapes now sought to be inspected and copied by the Respondents.*

We submit that this Court may appropriately deny Mr. Nixon's privacy claims in the present case solely on the

* We have not attempted to determine what portion of the tapes introduced as exhibits were disclosed to the public by Mr. Nixon prior to the *Mitchell* trial. However, one indication of the extent of the overlap can be found in the following statement made by Mr. Nixon during the course of his opposition to the subpoena *duces tecum* issued to him by the Special Prosecutor in connection with the *Mitchell* trial.

> "'[portions] of twenty of the conversations described in the subpoena have been made public and no claim of privilege is advanced with regard to those Watergate related portions of those conversations . . .'" *United States* v. *Mitchell*, 377 F. Supp. 1326, 1328 n.3 (D.D.C. 1974).

basis of the Court's analysis of the privacy question in *Nixon* v. *Administrator of General Services, supra.* However, we also believe that the Court of Appeals' rejection of the Petitioner's arguments is similarly dispositive;*

* Petitioner's reliance upon Fourth Amendment cases such as *Katz* v. *United States,* 389 U.S. 347 (1967) and *Silverman* v. *United States,* 365 U.S. 505 (1961) (Pet. Br. 27) is misplaced. The present action does not involve any Fourth Amendment considerations, "[at] the very core [of which] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (*Silverman, supra,* 365 U.S. at 511) Regardless of how Mr. Nixon's vague privacy claims are defined, they do not come within the ambit of any privacy considerations arising out of the Fourth Amendment. As this Court observed in *Katz, supra*:

> "[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." (389 U.S. at 350-51; emphasis in original) (Footnotes omitted)

Mr. Nixon's privacy argument is also unsupported by the Petitioner's curious reliance upon right-of-publicity cases such as *Price* v. *Hal Roach Studios, Inc.,* 400 F. Supp. 836 (S.D.N.Y. 1975) and *Ettore* v. *Philco Television Broadcasting Corp.,* 229 F.2d 481, 496 (3d Cir.), *cert. denied,* 351 U.S. 926 (1956). (Pet. Br. 27-28), since the right of *publicity* at issue in *Price, supra,* is entirely immaterial to the right of *privacy* which has been raised as an issue by Mr. Nixon in the present case. (*See Price, supra,* 400 F.Supp. at 843-44)

Petitioner's reliance upon *Doe* v. *Roe,* 42 App. Div.2d 559, 345 N.Y.S.2d 560 (1st Dep't), *aff'd,* 33 N.Y.2d 902, 307 N.E.2d 823, 352 N.Y.S.2d 626 (1973), *cert. dismissed as improvidently granted,* 420 U.S. 307 (1975), is similarly misplaced. (Pet. Br. 28-29) *Doe, supra,* involved "the right of a former patient to restrain her analyst's disclosure, through the means of a commercial book, of certain confidential communications." (42 App.Div. at 560, 345 N.Y.S.2d at 561) None of the sensitive issues involved in *Doe, supra,*—namely, the breach of the physician-patient privilege; the confidentiality of the patient's communications recorded by the physician during the patient's psychotherapeutic treatment—are even remotely relevant to the broadcasters' rights to make copies of those tapes evidencing a criminal conspiracy by the holders of the highest offices of this nation which were played in open court and introduced in evidence in the *Mitchell* trial.

Finally, Mr. Nixon's citation to the Code of Judicial Conduct's rules with respect to the propriety of the recording of judicial proceedings and the corollary rights of a witness to refuse consent to having his or her testimony recorded (Pet. Br. 30-31) are, as we have discussed earlier in this brief, simply inapposite to the present case which involves the right of the broadcasters to make copies of judicial records in the form of *exhibits* and not the right to either contemporaneously record judicial *proceedings* or to make copies of such recordings.

accordingly, we quote this portion of its opinion in full:

> "Perhaps the most important point to be made about Mr. Nixon's privacy claim is that he is not seeking to protect an expectation of privacy. The tapes already have been played in a public forum. Rather, [Mr. Nixon] seeks to avoid only what he terms 'intrusion on the sensibilities of those whose voices appear on the tapes.' But as [Mr. Nixon] concedes, this is not the type of injury against which the law provides protection. The fact that neither the legislatures nor the courts have felt this interest worthy of protection suggests that it is not a substantial basis for infringing the common law right to inspect judicial records.
>
> "But even if preventing embarrassment may sometimes justify access restrictions, there is plainly no justification for such restrictions here. The tapes at issue are *not* recordings of bedroom or other intimate conversations, and the embarrassment Mr. Nixon fears is *not* republication of highly personal matters. Rather, we deal with conversations between business associates admitted into evidence as proof of criminal misconduct. The embarrassment Mr. Nixon anticipates is largely that which results whenever misconduct or questionable conduct is exposed. If preventing this

'injury' justifies interfering with the public's right to inspect records, then the common law right can always be defeated in criminal cases.

"Beyond this, there are a number of factors unique to this case that militate in favor of Judge Gesell's decision. First, the conversations at issue relate to the conduct of the Presidency, and thus they are both impressed with the 'public trust', and of prime national interest. Second, the fact that the transcripts of the conversations already have received wide circulation makes this unlike a hypothetical case in which evidence previously accessible only to a few spectators will suddenly become available to the entire public. Finally, it seems likely that as a result of the Presidential Recordings and Material Preservation Act, the words and sounds at issue here will find a further entry way into the public domain.

"For all these reasons we are unable to conclude that Judge Gesell abused his discretion in rejecting the claim of privacy." (Pet. App. 22a-24a)

4. *The Argument Based Upon the Possibility of Reversal of Convictions in the Mitchell Trial*

The primary basis for Judge Sirica's denial of the broadcasters' application was his concern that should the decision in the *Mitchell* trial be reversed, the defendants' rights at retrial might be prejudiced by the broadcasting of the tapes. In light of the recent denial of certiorari by this Court with respect to the convictions of the defendants in the *Mitchell* trial and the publicly announced decision of the Special Prosecutor not to retry Mr. Mardian,* one might have thought that this issue at least was now removed from this case. Mr. Nixon, however, devotes 4 pages

* *See* discussion, *supra*, at 18 n*.

of his brief to the point (pp. 53-56), urging that while the "risk of retrials" in these now completed cases have been "substantially reduced" (p. 56), the opinion of the Court of Appeals remains irredeemably tainted by its conclusion that Judge Sirica erred in relying on that factor as his basis for not making the tapes now available. Such an argument is difficult to grapple with in much the same fashion it is often difficult to "prove" distasteful facts to congenital disbelievers. Suffice it to say, therefore, that unless Mr. Nixon's argument is that there will forever lurk the possibility of a retrial of his former associates on the basis of newly discovered evidence or the like and that the tapes presently sought to be copied may thus *never* be released, the *Mitchell* trial may surely be considered over and this objection, at least, to the release of the tapes may be deemed moot.

In any event, the decision of the Court of Appeals that Judge Sirica did not merely abuse his discretion in so ruling but misconceived the nature of that discretion is plainly correct. The three prongs of the Court's opinion were that the possibility of a new trial was too indefinite a basis to permit such a result;* that the material in this case all consisted of *admitted* evidence, not even the type of material generally considered a possible source of prejudice; and that (with the single exception of Mr. Haldeman's *pro forma* objection) the celebrated and well-counseled defendants had not even made such arguments on their own behalf. We believe these arguments are persuasive and correct.

* The recent developments described above in the *Mitchell* case confirm the wisdom of the Court's conclusion that claims asserted against the rights of the broadcasters and the public were far too speculative to withstand scrutiny.

CONCLUSION

We urge this Court to affirm the decision of the Court of Appeals permitting the broadcasters to copy the White House tapes played in open court and introduced in evidence in the *Mitchell* trial for the purpose of broadcasting them to the public.

Respectfully submitted,

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